No. 129

In the Supreme Court of the United States

OCTOBER TERM, 1939

GENERAL AMERICAN TANK CAR CORPORATION, PETITIONER

v.

EL DORADO TERMINAL COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CRCUIT

MEMORANDUM OF UNITED STATES AND INTERSTATE COMMERCE COMMISSION, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The United States and Interstate Commerce Commission have an interest in this controversy because of their statutory duties to administer and enforce the Interstate Commerce Act, certain provisions of which have been disregarded or erroneously interpreted and applied by the Circuit Court of Appeals. The rulings of that court depart from established interpretations of important sections of the Act, and produce confusion and uncertainty in the enforcement and application of those sections.

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I

Respondent[1] leased tank cars from the petitioner, an independent car company. Respondent furnished these leased cars to common carriers by railroad for use in transporting respondent's interstate shipments of coconut oil. The common carriers paid the petitioner certain mileage allowances for the use of the cars and the petitioner paid these allowances over to the respondent, but only to the extent of the rental paid by the respondent for the cars. Respondent thereupon brought this suit against petitioner to recover the remainder of the allowances received by petitioner on the ground that it was entitled, under the provisions of its contract with the petitioner, to the full amount of the allowances received by the petitioner.

The court below held (104 F. (2d) 903) that respondent was entitled to recover from petitioner mileage allowances of $18,532.78, representing the excess of the compensation received by petitioner from the railroads over the car rentals. In so holding, the court decided that the excess of the allowance over the respondent's rental expense did not constitute an unlawful rebate or concession to the shipper from the published rates paid by it to the railroads for the transportation of its coconut oil.

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[1] The term "respondent" is used herein to designate both the El Dorado Terminal Company, the plaintiff, and the El Dorado Oil Works, its parent company. The alleged cause of action arose in favor of the parent company, which assigned it to its subsidiary.

The court below further held that these allowances might lawfully be received by respondent notwithstanding the fact that the published tariffs of the railroads made no provision for an allowance to the shipper but instead expressly provided that the mileage allowances for the use of privately owned cars would be paid only to the owner of the cars or to the company whose "reporting marks" were stenciled or painted on the cars. The cars in question were owned by the petitioner, a private and independent company, and they bore petitioner's "reporting marks." Consequently, under the tariff provisions, no allowances were payable to the shipper. The allowances were actually paid to the petitioner, despite the fact that it was not the shipper and had not furnished the cars to the railroads.

In rendering this decision, the court below apparently assumed that the District Court had jurisdiction to determine the allowance which the shipper should receive. The Interstate Commerce Act, however, gives the Interstate Commerce Commission exclusive jurisdiction to determine the amount which a shipper is entitled to receive when there is no published tariff providing for an allowance to it for cars which it furnishes but does not own. Under Section 6 (1) and (7) of the Act, no allowance may lawfully be paid to a shipper unless the allowance is published in the carrier's tariff. The shipper's recourse is to secure an al-

lowance by Commission authorization pursuant to Section 15 (13). That section provides (49 U. S. C. Sec. 15 (13)):

> If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

The reasonableness of the allowance in question, at the rate of 1½ cents for each mile that each of the cars moved, loaded or empty, over the railroad lines, was not presented to or determined by the Commission.

II

The petition for certiorari specifies several reasons for allowance of the writ. The discussion thereof in the brief in support of the petition reveals the substantial interest of the Interstate Commerce Commission and of the United States in the questions presented. Particularly important in the administration of the Interstate Commerce Act is the question of whether the receipt by the ship-

per of mileage allowances for leased cars in excess of the rental paid by the shipper for the cars constitutes an unlawful rebate or concession, or gives the shipper an advantage in respect to its shipments in violation of the Elkins Act. The decision of the court below is contrary to the principle established by the Commission in *Use of Privately Owned Refrigerator Cars,* 201 I. C. C. 323, and until the question is authoritatively decided by this Court, the Commission will be unable to determine how to administer the Act in this respect.

But there are reasons, other than those specified in the petition, why we believe the writ should be granted. The first is the question of the jurisdiction of the court below to consider the questions which it decided. We have pointed out above that the published tariffs of the railroads made no provision for an allowance to a shipper furnishing cars which it did not own and which did not bear its "reporting marks." No allowance, therefore, should be made by the carriers to the shipper under their tariffs, and the shipper should receive its allowance only by authorization of the Commission pursuant to Section 15 (13) of the Interstate Commerce Act, above quoted.

The Commission has not determined the reasonableness of the allowance or fixed the amount thereof, and in entering judgment for the respondent prior to such determination by the Commision, the

court below has, we believe, usurped the exclusive administrative power expressly conferred upon the Commission by the Act.[2]

The assumption and exercise of jurisdiction in this case is in direct conflict with many decisions of this Court. In *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, this Court held that it was without jurisdiction of a suit for damages based, among other things, upon alleged unreasonable allowances, saying at pages 263–264:

> In case any question arose as to the reasonableness of the practice * * * or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body.

[2] This question of jurisdiction was not raised or considered in either of the courts below. Nevertheless, the courts below should have declined *sua sponte* to proceed with the cause. *United States* v. *Corrick*, 298 U. S. 435. Neither the United States nor the Commission was a party to the proceedings there, nor was this case brought to their attention until after the opinion of the Circuit Court of Appeals had been rendered.

In *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43, a shipper sued in a state court, without preliminary resort to the Commission, to recover, as damages, his expense incurred in installing inside grain-doors in box cars furnished by the carrier for transportation of grain. The carrier's tariffs did not provide for payments or allowances for grain doors. In affirming the judgment of the state court that it was without jurisdiction of the suit this Court stated (p. 50):

> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. * * *

The foregoing quotations merely reiterate the jurisdictional principles first established in *Texas*

& Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, a decision from which this Court has never departed. See also *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Warehouse Co.* v. *United States*, 283 U. S. 501, and *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933 (C. C. A. 5th), certiorari denied, 255 U. S. 574.

In addition to the jurisdictional question, we believe that the writ should be granted because the decision of the court below that a shipper may lawfully receive an allowance made by a common carrier by railroad despite the lack of express tariff provision therefor, is contrary to the provisions of Section 6 (1) and (7) of the Interstate Commerce Act. These sections require publication of rates and of "all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered," and provide that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * *." The decision below, disregarding these sections of the Act, is contrary to many decisions

of this Court, of other federal courts and of the Interstate Commerce Commission. *United States* v. *Chicago & A. Ry. Co.*, 148 Fed. 646 (D. C. N. D. Ill.), affirmed, 156 Fed. 558 (C. C. A. 7th), affirmed, 212 U. S. 563; *Elwood Grain Co.* v. *St. Joseph & G. I. Ry. Co.*, 202 Fed. 845 (C. C. A. 8th); *Terminal Allowance, etc.*, 192 I. C. C. 67, 69; *Rates on Railroad Fuel and Other Coal*, 36 I. C. C. 1, 13; *General Electric Co.* v. *N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237, 242; *Victor Fuel Co.* v. *Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 119; compare *United States* v. *Am. Sheet & Tin Plate Co.*, 301 U. S. 402, 408; *Warehouse Co.* v. *United States*, 283 U. S. 501, 511; *Fourche R. R. Co.* v. *Bryant Lbr. Co.*, 230 U. S. 316; *Southern Cotton Oil Co.* v. *Central of Georgia Ry. Co.*, 228 Fed. 335 (C. C. A. 5th).

Under the provisions of the Interstate Commerce Act, and of the Elkins Act which supplements and reinforces it (c. 708, 32 Stat. 847, c. 3591, 34 Stat. 587, U. S. C., Title 49, Secs. 41–43), the primary method by which discriminations are sought to be prevented and uniformity secured is the requirement that rates be published and strictly adhered to. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72. The decision below contravenes this cardinal principle of regulation.

III

The case involves important questions of unusual consequence in the enforcement and administration of the Interstate Commerce Act and the Elkins Act which have not been but should be settled by this Court. The petition should, therefore, be granted.

Respectfully submitted.

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